

Nguyen (Migration) [2020] AATA 5379 (22 October 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Tan Tai Nguyen
VISA APPLICANT:	Mrs Thuy Kieu Tran
CASE NUMBER:	1801409
DIBP REFERENCE(S):	BCC2017/1333991
MEMBER:	Donna Petrovich
DATE:	22 October 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 22 October 2020 at 12:22pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – no evidence of pooling of finances – limited evidence of regular communication – sponsor’s visits to Vietnam – no details of work and family plans and activities – business interests in their respective countries – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 January 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 10 April 2017 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 (1) and may not be in a genuine relationship because the delegate was not satisfied at the time of application that the main applicant met the legal requirements in subclass 309.211(1) of Schedule 2.
4. The review applicant appeared before the Tribunal on 12 February 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Tan Tai Nguyen, the husband of the applicant.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant and sponsor are in a genuine relationship.

Whether the parties are in a spouse or de facto relationship

7. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

9. If the parties are validly married, they may meet the requirements of a married relationship. The Tribunal accepts that the applicants were married on the 14 June 2015, after their engagement on 13 June 2015, and is satisfied that the Marriage certificate provided in evidence to the Tribunal is valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

10. Financial aspects of the relationship

11. The parties both have a Vietnamese background.
12. The sponsor told the Tribunal that he was self-employed, and that his handyman business was going well. The applicant explained that she used to work for the city council when she and the sponsor had met initially, but that she now works for a private company. The couple said that they kept their finances separate, but when they were together that the sponsor gave the applicant money and that she did the shopping for the household.
13. The sponsor gave evidence that he had paid for the applicant's Nail Technician course, an amount of \$350 AUD, and that he had also invested \$6000 in a shrimp farm being run by the applicant and the applicant's mother. He told the Tribunal that he had received no dividends or repayment of this money, that it was for the applicant to use as she saw fit. He told the Tribunal that he thought the business was viable as shrimp could be harvested every three months.
14. The applicant and the sponsor both told the Tribunal that they maintained individual bank accounts and had not yet gotten around to opening a joint bank account together. The Tribunal in considering this did not find any evidence of pooling of resources or sharing of day to day household expenses. The couple do not own any joint assets, including the shrimp farm which is the property of the applicant and her mother, although the sponsor has invested \$6000. Transfer receipt documents submitted support this. The Tribunal places no weight in favour of the applicant in this regard.

15. Nature of the Household

16. The couple told the Tribunal that the sponsor had visited the applicant on a number of occasions since they first met and were married. The sponsor told the Tribunal that when he was in Vietnam, they would generally stay at the applicant's home which she shares with her sister in Soc Tran, or in Saigon with the sponsor's mother. The sponsor told the Tribunal that when they were married, they stayed in a hotel for one week of their honeymoon and then at his wife's house where they shopped and cooked and planted a tree in the garden.
17. The applicant told the Tribunal that when her husband visited, he generally stayed for two to four months, and he had been to Vietnam every year except the last two years as her husband was applying for Australian Citizenship. She told the Tribunal that she was a good cook and enjoyed cooking for her husband.
18. The applicant told the Tribunal that her husband did not do a lot of the household duties as she wanted him to relax, but they did shop together, and they would spend time eating out with friends or at home preparing food and enjoying each other's company.
19. The sponsor told the Tribunal that he lived alone in Australia and had no family here and would appreciate his wife being with him when he came home from work. The couple have

not spent significant time together since their marriage, and have not seen each other for two years, they told the Tribunal that they speak on the phone and communicate daily, but have provided limited evidence of this.

20. The Tribunal in considering the nature of the household finds that the couple have spent a total of nine months together since they were married on 15 June 2015, and whilst they have told the Tribunal of their social life together they have provided little photographic or other evidence to corroborate this, and whilst this is not a requirement, there was little other information to assist in this regard. Likewise, evidence of their daily communication is limited to generally three to seven minutes on average and telephone records provided are to an unsubstantiated telephone number, and there are also text messages between the parties in Vietnamese.
21. The Tribunal has given consideration to the existence of a household between the parties. It is noted that the parties married some five years ago, and that the Sponsor has visited Vietnam on a number of occasions since that time.
22. Regardless, doubt is thrown on whether there was in fact a household or whether the parties were living in the same house at the same time. The Tribunal finds this on the basis of the vagueness about these stays and about household activities from the parties. With discussions around household activity being vague and superficial.
23. Whilst the couple may have lived under the same roof at different points, it is not possible to determine the length of stay, or indeed whether the parties lived as husband and wife despite the evidence provided at the hearing. The Tribunal is left with an incomplete picture of work and family plans and activities, and the parties plans for a future household were not discussed at the hearing. It is acknowledged that the parties live in different countries and accepts that this presents challenges for the parties. However, in considering all of the evidence presented the Tribunal places little weight in favour of the applicants in this regard.

24. Nature of the persons' commitment to each other

25. The couple first met in 1 December 2013 when the sponsor who was then a monk visited Vietnam and took money for the poor and blind. He explained that to do this he was required to seek permission from the Local Council, where the applicant was working at the time. They met and in May 2014 he started to have some feelings for her. He spent three months there, and it is claimed by the applicant that she has spent a lot of time with the sponsor. The applicant first visited Vietnam on 1 December 2013, and then returned to Australia the sponsor when he visited Vietnam, he would stay for up to four months, with the least amount of time spent was one month.

26. The Sponsor visited Vietnam on these dates:

27. 15 December 2014 and returned to Australia 14 February 2015;
28. 13 June 2015 the parties held a pre-wedding function in Soc Trang;
29. 14 June 2015 the parties held a wedding reception;
30. 14 August 2015 the sponsor returned to Australia;
31. 6 September 2016 the sponsor returned to Vietnam;
32. 14 October 2016 the sponsor returned to Australia;

- 33. 9 January 2017 the sponsor returned to Vietnam;
- 34. 14 February 2017 signed marriage certificate;
- 35. 29 January 2018 the sponsor visited Vietnam;
- 36. 3 April 2018 the sponsor returned to Australia.
- 37. The sponsor told the Tribunal that he had not been to Vietnam for the last two years, as he was waiting to be granted his Australian citizenship. Whilst there is some consistency in the relationship over the last seven years since the couple met and since the couple have been married, they each maintain their own homes in separate countries and could not demonstrate clearly that they shared household activities in the usual way.
- 38. The Tribunal in considering this finds that the couple largely live separate lives and have not been able to provide evidence to convince the Tribunal of their commitment to each other. The Tribunal places little weight in favour in this regard.

39. Social aspects of the relationship

- 40. The applicant also told the Tribunal that when her husband was in Vietnam, they visited friends and sometimes went out together and that these friends are mostly women and are friendships that she has formed from doing a Nail course, that her husband paid for. These are single women and the sponsor is generally the only male in attendance.
- 41. The applicants told the Tribunal that they had a large wedding and that they had hired a restaurant and that they had 50 guests in attendance. The sponsor was not able to corroborate this and told the Tribunal that there were 250 guests in attendance. The Applicant told the Tribunal that they visited friends, went out for dinner and spent time with the applicant's family and the sponsor's mother. The Tribunal in considering this was not provided with any material to substantiate this and therefore places little weight in favour of the applicant in this regard.
- 42. The applicant and sponsor told the Tribunal that they visited their families in Soc Trang and Saigon together. The Tribunal has considered this but was not provided with any supporting evidence to verify these statements and therefore places little weight in the applicant's favour.

43. Nature of the persons commitment to each other

- 44. The applicant told the Tribunal that the couple speak every day via telephone or chat for one hour and sometimes twice a day after the sponsor finishes work. The couple was married on 14 June 2015, after meeting on 1 December 2013, and they have maintained contact during this time, with the sponsor visiting the applicant and staying together for one to four months during these visits. Both the sponsor and the applicant described their lives together during this period in a similar way, and they spoke of visiting friends and family and shopping, cooking and they both mentioned planting a tree together in the applicant's garden. The sponsor responded to the Tribunal's questions in relation to if the decision was not favourable that he might consider moving to Vietnam to be with his wife.
- 45. The Tribunal has considered the length of time that the couple have spent in this relationship to be significant, but actual time spent together limited, and finds little compelling evidence to the nature or the degree of companionship and support they draw from each other.

46. There was little in their submission to indicate that the couple considered their relationship to be long term. The couple have both developed business interests in their respective countries which would indicate focus on their individual interests and priorities. The Tribunal in considering all of the evidence places some small weight in favour of the applicants due to the length of their relationship.

47. Any other circumstances

48. The Tribunal finds that there are no other circumstances to be considered.

49. In relation to s.5F(2)(b)-(d) the Tribunal finds little evidence to establish that the couple have a mutual commitment to a shared life to the exclusion of others, and finds little to support that the relationship is genuine and continuing in the sense that while the couple say they have maintained contact they have provided very little in the way of telephone records and have not seen each other for the last 2 years. On this basis, it is clear that the couple have not lived together or visited in the last two years and therefore, the relationship is not continuing, and they do live apart on a permanent basis. The Tribunal has considered this and gives no weight in favour of exercising discretion not to cancel.

50. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.

51. Therefore, the visa applicant does not meet cl.309.211 and cl.309.221.

52. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

53. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Donna Petrovich
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).